No. 15870

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. D. Reeder Contractors of Arizona, an Arizona corporation,

Appellant,

vs.

Higgins Industries, Inc., a Louisiana corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Preface.

Prior to the main portion of this brief, a few brief comments may be in order.

In the first place, the facts as set forth in Appellant's Opening Brief are fully supported by the references to the record, and have been checked with care. They are accurate.

Further factual statements, appearing herein, will also bear references to the record.

ARGUMENT.

I.

Appellee's brief deprecates the very substantial factors which are present here, and which must be considered in determining whether appellee is amenable to service of process in California. These may be grouped as:

1. Substantial Contacts Apart From the Matter in Suit.

The record shows that, without regard to any matter directly connected with this litigation, appellee

a. Ships one million dollars worth of merchandise into California concurrently, and has been increasing this volume since 1951.

b. Officers of appellee visited California in 1954 and 1955 [R. 70, 72] (this action concerns events in the latter half of 1954 and early 1955);

c. Officers of appellee furnished technical advice in California concerning its products [R. 51];

d. Officers of appellee checked on sales and merchandising techniques of its product in California [R. 51, 70, 73];

e. Officers of appellee have dealt directly with customers of its product in California [R. 51];

f. Appellee furnished advertising mats and brochures for use in California [R. 52, 61];

g. Appellee advertises in publications having circulation in California, and forwards the inquiries therefrom to California for sales promotion [R. 51-52, 58, 60-61, 70];

h. Supplies funds for promotion of hardwood flooring in California, including exhibition of its products here [R. 52, 62, 70-71, 73-75];

i. Maintains close contact with its distributors and large construction projects, to promote sales in California [R. 60, 62].

2. Substantial Contacts With California Re Matter in Suit.

Unquestionably, the block which was defective was ordered for use in Arizona. However, appellee fails to mention:

a. Appellant, in California, ordered the block from McCauley Lumber and Flooring Co., Inc., a California corporation, located at Whittier, California [R. 64];

b. McCauley, from California, received by telephone from Appellee details of the Arizona project and a quotation [R. 53]; McCauley placed its orders from California [R. 28-30];

c. Appellee's officer, Edwin P. Crozat, visited appellant at Los Angeles in connection with the very matter in suit, and made direct representations as to what it required done [R. 53, 65-68], accompanied by a McCauley salesman;

d. McCauley acted for, and in connection with, appellee [R. 4-5, 45-46].

3. Other Important Factors.

a. McCauley Lumber and Flooring Co., Inc. is a California corporation, and a codefendant herein. It has filed a cross-claim against appellee.

b. The officers of appellant are located in California and are residents of California; the sales and purchasing departments of appellant are located in California, and its books and records are maintained in California [R. 63-64].

As the Supreme Court has stated, in *International Shoe Co. v. Washington,* 326 U. S. 310, 319, 66 S. Ct. 154, 159:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

The same court pointed out in *McGee v. International Life Insurance Company,* 355 U. S. 220, 78 S. Ct. 199, 201, that modern transportation and communication have made it much less burdensome for a party to defend itself in a State where it engages in economic activity.

Certainly, the facts grouped at 1., *supra,* show that California is a state in which appellee engages in economic activity on a very large scale. It, and its officers, seem to experience little difficulty in coming to California in order to promote business; and the affidavits do not disclose that defending an action in California would be in any way burdensome.

The facts set forth under 3., *supra,* are also of great importance. To begin with, appellee's co-defendant below is a California concern, and must be sued here. As the California Supreme Court stated, in *Henry R. Jahn and Son v. Superior Court,* 49 A. C. 882, 887, 888, 323 P. 2d 437, 441, 442:

> "It also bears emphasis that if plaintiff were unable to bring an action against Jahn here, it would be

> similarly frustrated with regard to Jahn's co-defendants in New York. Two actions instead of one would then be necessary to litigate the existence or nonexistence of a single tortious conspiracy. . . .
>
> Jahn's burden of defending here is no greater than plaintiff's burden of suing in New York. The cause of action is directly *related to Jahn's dealings with* the California plaintiff and *the California defendants*. A denial of jurisdiction would lead only to a duplicity of litigation. '[T]he quality and nature of the activity in relation to the fair and orderly administration of the laws' fully justifies subjecting Jahn to the jurisdiction of our courts."

The same considerations were considered and weighed in *Gordon Armstrong Company v. Superior Court*, 160 A. C. A. ....., 325 P. 2d 21. In that case also, a California co-defendant was involved, and the court took note that duplicity of litigation would result if jurisdiction were denied. The court also noted that the evidence and witnesses were available in California, and took notice that these considerations were applicable in determining what action best comports with "traditional notions of fair play and substantial justice." The facts of that case are less compelling than those here, where the major activity of the foreign corporation was solicitation by advertising and direct mail. (See the affidavit and statement at 323 P. 2d, pp. 22-23.)

In the instant case, the contacts are necessarily multistate, but the action has greater ties with California. Not only is one defendant here, a great number of the witnesses and documentary evidence here; but there are numerous direct contacts with California relating directly to the transaction in suit. Not only were all the negotia-

tions conducted in California (including telephone contacts between Whittier, California and Louisiana), and all of the orders prepared here, but there was direct contact between an officer of appellee and appellant in California concerning the order.

Taking all of these facts in context, it is submitted that traditional notions of fair play and justice require that suit be had in California; that denial thereof would lead to duplicity of litigation; that the quality and nature of appellee's activity here in relation to the fair and orderly administration of the laws more than justifies jurisdiction here; and that, to the extent that the practical considerations implicit in the doctrine of *forum convenien* are relevant, the balance is clearly in favor of a trial on the merits here.

II.

Appellee also raises the question of venue. Of course, the court below dismissed on the jurisdictional ground [R. 85, 87]. Assuming that venue were improper, the court below could either transfer or dismiss (28 U. S. C. §§1404, 1406); the court held, however, that it lacked jurisdiction over appellee, and dismissed on that ground alone. It did not decide the venue question. If appellee is doing business in California, as assuredly it is, venue is proper (28 U. S. C., §1391).

Respectfully submitted,

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